Supplemental Materials:

Creating Effective Compliance Systems and Processes

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Regulatory Notice 10-06

Social Media Web Sites

Guidance on Blogs and Social Networking Web Sites

January 2010

Notice Type

- Guidance

Suggested Routing

- Advertising
- Compliance
- Legal
- Operations
- Registered Representative
- Senior Management

Key Topics

- Blogs
- Communications with the Public
- Recordkeeping
- Social Networking Web Sites
- Supervision

Referenced Rules & Notices

- ICA Section 24(b)
- NASD Rule 2210
- NASD Rule 2310
- NASD Rule 2711
- NASD Rule 3010
- NASD Rule 3070
- NASD Rule 3110
- NYSE Rule 351
- NYSE Rule 401A
- NYSE Rule 410
- NYSE Rule 472
- NTM 01-23
- NTM 03-33
- Regulatory Notice 07-59
- Regulatory Notice 09-55
- SEA Rule 17a-3
- SEA Rule 17a-4
- Securities Act Rule 482

Executive Summary

Americans are increasingly using social media Web sites, such as blogs and social networking sites, for business and personal communications. Firms have asked FINRA staff how the FINRA rules governing communications with the public apply to social media sites that are sponsored by a firm or its registered representatives. This *Notice* provides guidance to firms regarding these issues.

Questions concerning this *Notice* may be directed to:

- Joseph E. Price, Senior Vice President, Advertising Regulation/ Corporate Financing, at (240) 386-4623; or
- Thomas A. Pappas, Vice President and Director, Advertising Regulation, at (240) 386-4500.

Background

According to a recent report by the Pew Internet and American Life Project, 46 percent of American adults who use the Internet logged onto a social networking site in 2009, which is up from 8 percent in 2005.[1] Other studies have shown that use of social media sites by businesses to communicate with customers and the public has grown significantly in the past few years.[2]

FINRA has provided guidance concerning particular applications of the communications rules to interactive Web sites in the past. For example, in March 1999, FINRA stated that a registered representative's participation in an Internet chat room is subject to the same requirements as a presentation in person before a group of investors.[3] This guidance was codified in 2003, when FINRA defined the term "public appearance" in NASD Rule 2210 to include participation in an interactive electronic forum.[4]

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FINRA also has provided guidance regarding the application of the communication rules in its *Guide to the Internet for Registered Representatives*,[5] and has released podcasts on these issues to help educate firms and their personnel.[6] Nevertheless, FINRA staff has continued to receive numerous inquiries from firms and others concerning how the FINRA rules governing communications with the public apply to the use of social media sites by firms and their registered representatives. Firms also have inquired regarding their recordkeeping responsibilities for communications posted on social media sites.

In September 2009, FINRA organized a Social Networking Task Force composed of FINRA staff and industry representatives to discuss how firms and their registered representatives could use social media sites for legitimate business purposes in a manner that ensures investor protection. Based on input from the Task Force and others, and further staff consideration of these issues, FINRA is issuing this *Notice* to guide firms on applying the communications rules to social media sites, such as blogs and social networking sites. The goal of this *Notice* is to ensure that—as the use of social media sites increases over time—investors are protected from false or misleading claims and representations, and firms are able to effectively and appropriately supervise their associated persons' participation in these sites. At the same time, FINRA is seeking to interpret its rules in a flexible manner to allow firms to communicate with clients and investors using this new technology.

While many firms may find that the guidance in this *Notice* is useful when establishing their own procedures, each firm must develop policies and procedures that are best designed to ensure that the firm and its personnel comply with all applicable requirements. Every firm should consider the guidance provided by this *Notice* in the context of its own business and its compliance and supervisory programs.

This *Notice* only addresses the use by a firm or its personnel of social media sites for business purposes. The *Notice* does not purport to address the use by individuals of social media sites for purely personal reasons.

Questions & Answers

Recordkeeping Responsibilities

Q1: Are firms required to retain records of communications related to the broker-dealer's business that are made through social media sites?

A1: Yes. Every firm that intends to communicate, or permit its associated persons to communicate, through social media sites must first ensure that it can retain records of those communications as required by Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and NASD Rule 3110. SEC and FINRA rules require that for record retention purposes, the content of the communication is determinative and a broker-dealer must retain those electronic communications that relate to its "business as such."[7]

FINRA is aware that some technology providers are developing systems that are intended to enable firms to retain records of communications made through social media sites. Some systems might interface with a firm's network to capture social media participation and feed it into existing systems for the review and retention of email. Other providers are developing technology that might permit a registered representative working off-site to elect to access social media through platforms that will retain the communications on behalf of the firm.

Of course, it is up to each firm to determine whether any particular technology, system or program provides the retention and retrieval functions necessary to comply with the books and records rules. FINRA does not endorse any particular technology necessary to keep such records, nor is it certain that adequate technology currently exists.

Suitability Responsibilities

Q2: If a firm or its personnel recommends a security through a social media site, does this trigger the requirements of NASD Rule 2310 regarding suitability?

A2: Yes. Whether a particular communication constitutes a "recommendation" for purposes of Rule 2310 will depend on the facts and circumstances of the communication. Firms should consult *Notice to Members (NTM) 01-23* (Online Suitability) for additional guidance concerning when an online communication falls within the definition of "recommendation" under Rule 2310.

Various social media sites include functions that make their content widely available or that limit access to one or more individuals. Rule 2310 requires a broker-dealer to determine that a recommendation is suitable for every investor to whom it is made.

Q3: What factors should firms consider when developing procedures for supervising interactive electronic communications on a social media site that recommend specific investment products?

A3: Communications that recommend specific investment products often present greater challenges for a firm's compliance program than other communications. As discussed above, they may trigger the FINRA suitability rule, thus creating possible substantive liability for the firm or a registered representative. These communications must often include additional disclosure in order to provide the customer with a sound basis for evaluating the facts with respect to the product. They also might trigger other requirements under the federal securities laws.[8] FINRA has brought disciplinary actions regarding interactive electronic communications that contained misleading statements about investment products that the communications recommended.[9]

For these reasons, firms must adopt policies and procedures reasonably designed to address communications that recommend specific investment products. As a best practice, firms should consider prohibiting all interactive electronic communications that recommend a specific investment product and any link to such a recommendation unless a registered principal has previously approved the content.

Alternatively, many firms maintain databases of previously approved communications and provide their personnel with routine access to these templates. Firms might consider prohibiting communications that recommend a specific investment product unless the communication conforms to a pre-approved template and the specific recommendation has been approved by a registered principal. Firms also should consider adopting policies and procedures governing communications that promote specific investment products, even if these communications might not constitute a "recommendation" for purposes of our suitability rule or otherwise.

Types of Interactive Electronic Forums

The definition of "public appearance" in NASD Rule 2210 includes unscripted participation in an interactive electronic forum such as a chat room or online seminar. Rule 2210 does not require firms to have a registered principal approve in advance the extemporaneous remarks of personnel who participate in public appearances. However, these interactive electronic forums are subject to other supervisory requirements and to the content requirements of FINRA's communications rule.

Q4: Does a blog constitute an "interactive electronic forum" for purposes of Rule 2210?

A4: The treatment of a blog under Rule 2210 depends on the manner and purposes for which the blog has been constructed. Merriam-Webster's Online Dictionary defines "blog" as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer."[10] Historically, some blogs have consisted of static content posted by the blogger. FINRA considers static postings to constitute "advertisements" under Rule 2210. If a firm or its registered representative sponsors such a blog, it must obtain prior principal approval of any such posting. Today, however, many blogs enable users to engage in real-time interactive communications. If the blog is used to engage in real-time interactive communications, FINRA would consider the blog to be an interactive electronic forum that does not require prior principal approval; however, such communications must be supervised, as discussed below.[11]

Q5: Social networking sites, such as Facebook, Twitter and LinkedIn, typically include both static content and interactive functions. Are these sites interactive electronic forums for purposes of Rule 2210?

A5: Social networking sites typically contain both static and interactive content. The static content remains posted until it is changed by the firm or individual who established the account on the site. Generally, static content is accessible to all visitors to the site.

Examples of static content typically available through social networking sites include profile, background or wall information. As with other Web-based communications such as banner advertisements, a registered principal of the firm must approve all static content on a page of a social networking site established by the firm or a registered representative before it is posted.[12] Firms may use an electronic system to document these approvals.

Social networking sites also contain non-static, real-time communications, such as interactive posts on sites such as Twitter and Facebook. The portion of a social networking site that provides for these interactive communications constitutes an interactive electronic forum, and firms are not required to have a registered principal approve these communications prior to use. Of course, firms still must supervise these communications, as discussed below.

Supervision of Social Media Sites

Q6: How must firms supervise interactive electronic communications by the firm or its registered representatives using blogs or social networking sites?

A6: The content provisions of FINRA's communications rules apply to interactive electronic communications that the firm or its personnel send through a social media site. While prior principal approval is not required under Rule 2210 for interactive electronic forums, firms must supervise these interactive electronic communications under NASD Rule 3010 in a manner reasonably designed to ensure that they do not violate the content requirements of FINRA's communications rules.[13]

Firms may adopt supervisory procedures similar to those outlined for electronic correspondence in *Regulatory Notice 07-59* (FINRA Guidance Regarding Review and Supervision of Electronic Communications). As set forth in that *Notice*, firms may employ risk-based principles to determine the extent to which the review of incoming, outgoing and internal electronic communications is necessary for the proper supervision of their business.

For example, firms may adopt procedures that require principal review of some or all interactive electronic communications prior to use or may adopt various methods of post-use review, including sampling and lexicon-based search methodologies as discussed in *Regulatory Notice 07-59*. We are aware that technology providers are developing or may have developed systems that are intended to address both the books and records rules and supervisory procedures for social media sites that are similar or equivalent to those currently in use for emails and other electronic communications. FINRA does not endorse any particular technology. Whatever procedures firms adopt, however, must be reasonably designed to ensure that interactive electronic communications do not violate FINRA or SEC rules.

Firms are also reminded that they must have policies and procedures, as described in *Regulatory Notice 07-59*, for the review by a supervisor of employees' incoming, outgoing and internal electronic communications that are of a specific subject matter that require review under FINRA rules and federal securities laws, including:

- NASD Rule 2711(b)(3)(A) and NYSE Rule 472(b)(3), which require that a firm's legal and compliance department be copied on communications between non-research and research departments concerning the content of a research report;
- NASD Rule 3070(c) and NYSE Rule 351(d), which require the identification and reporting of customer complaints; NYSE Rule 401A requires that the receipt of each complaint be acknowledged by the firm to the customer within 15 business days; and

- ➤ NASD Rule 3110(j) and NYSE Rule 410, which require the identification and prior written approval of every order error and other account designation change.

Q7: What restrictions should firms place on which personnel may establish an account with a social media site?

A7: Firms must adopt policies and procedures reasonably designed to ensure that their associated persons who participate in social media sites for business purposes are appropriately supervised, have the necessary training and background to engage in such activities, and do not present undue risks to investors. Firms must have a general policy prohibiting any associated person from engaging in business communications in a social media site that is not subject to the firm's supervision. Firms also must require that only those associated persons who have received appropriate training on the firm's policies and procedures regarding interactive electronic communications may engage in such communications.

As firms develop their policies, they should consider prohibiting or placing restrictions on any associated person who has presented compliance risks in the past, particularly compliance risks concerning sales practices, from establishing accounts for business purposes with a social media site. In its supervision of social networking sites, each firm must monitor the extent to which associated persons are complying with the firm's policies and procedures governing the use of these sites. Firms also should consider policies that address associated persons' continued use of such sites if the firm's supervisory systems demonstrate compliance risks. Firms should take disciplinary action if the firm's policies are violated.

Third-Party Posts

Q8: If a customer or other third party posts content on a social media site established by the firm or its personnel, does FINRA consider the third-party content to be the firm's communication with the public under Rule 2210?

A8: As a general matter, FINRA does not treat posts by customers or other third parties as the firm's communication with the public subject to Rule 2210. Thus, the prior principal approval, content and filing requirements of Rule 2210 do not apply to these posts.

Under certain circumstances, however, third-party posts may become attributable to the firm. Whether third-party content is attributable to a firm depends on whether the firm has (1) involved itself in the preparation of the content or (2) explicitly or implicitly endorsed or approved the content.

The SEC has referred to circumstance (1) above as the "entanglement" theory (*i.e.*, the firm or its personnel is entangled with the preparation of the third-party post) and (2) as the "adoption" theory (*i.e.*, the firm or its personnel has adopted its content).[14] Although the SEC has employed these theories as a basis for a company's responsibility for third-party information that is hyperlinked to its Web site, a similar analysis would apply to third-party posts on a social media site established by the firm or its personnel.

For example, FINRA would consider such a third-party post to be a communication with the public by the firm or its personnel under the entanglement theory if the firm or its personnel paid for or otherwise was involved with the preparation of the content prior to posting. FINRA also would consider a third-party post to be a communication with the public by the firm or its personnel under the adoption theory if, after the content is posted, the firm or its personnel explicitly or implicitly endorses or approves the post.[15]

Q9: Must a firm also use a disclaimer to inform customers that third-party posts do not reflect the views of the firm and have not been reviewed by the firm for completeness or accuracy?

A9: Assuming the disclaimer was sufficiently prominent to inform investors of the firm's position, such a disclaimer would be part of the facts and circumstances that FINRA would consider in an analysis of whether a firm had adopted or become entangled with a posting.

Q10: Must a firm monitor third-party posts?

A10: FINRA does not consider a third-party post to be a firm communication with the public unless the firm or its personnel either is entangled with the preparation of the third-party post or has adopted its content. Nevertheless, FINRA has found through its discussions with members of the Social Networking Task Force and others that many firms monitor third-party posts on firm Web sites. For example, some firms monitor third-party posts to mitigate the perception that the firm is adopting a third-party post, to address copyright issues or to assist compliance with the "Good Samaritan" safe harbor for blocking and screening offensive material under the Communications Decency Act.[16]

Some of the other best practices adopted by Task Force members include:

- establishing appropriate usage guidelines for customers and other third parties that are permitted to post on firm-sponsored Web sites;
- establishing processes for screening third-party content based on the expected usage and frequency of third-party posts; and
- disclosing firm policies regarding its responsibility for third-party posts.

Endnotes

1 *See* Amanda Lenhart, Pew Internet and American Life Project, *The Democratization of Online Social Networks* (Oct. 8, 2009), *http://fe01.pewinternet.org/Presentations/2009/41--The-Democratization-of-Online-Social-Networks.aspx.*

2 Sharon Gaudin, *Business Use of Facebook, Twitter Exploding*, Computerworld (Nov. 9, 2009), at *www.computerworld.com/s/article/9140579/Business_use_of_Twitter_Facebook_exploding.*

3 *See* "Ask the Analyst – Electronic Communications," NASD Regulation, *Regulatory & Compliance Alert* (Mar. 1999) ("March 1999 Ask the Analyst").

4 *See* NASD Rule 2210(a)(5).

5 *See Guide to the Internet for Registered Representatives*, at *www.finra.org/Industry/Issues/Advertising/p006118.*

6 *See* "Electronic Communications: Blogs, Bulletin Boards and Chat Rooms" (Feb. 23, 2009), and "Electronic Communications: Social Networking Web Sites" (Mar. 10, 2009) at *www.finra.org/ podcasts.*

FINRA is also hosting webinars on compliance considerations for social networking sites on February 3 and March 17, 2010. Find more information at *www.finra.org/webinars.*

7 *See*, SEC Rel. No. 34-37182 (May 9, 1996), 61 Fed. Reg. 24644 (May 15, 1996); SEC Rel. No. 34-38245 (Feb. 5, 1997), 62 Fed. Reg. 6469 (Feb. 12, 1997); *Notice to Members 03-33* (July 2003).

8 For example, even if FINRA considers a communication made through an interactive electronic forum to be a public appearance, the SEC staff could still conclude that Rule 482 under the Securities Act of 1933 and the filing requirements of Section 24(b) of the Investment Company Act of 1940 apply to the communication. Accordingly, firms must consider these requirements in determining whether to permit interactive electronic communications that discuss registered investment companies.

9 For example, in a Default Decision dated November 23, 2009, FINRA fined and suspended a registered principal who held put options for himself and issued unapproved bulletin board messages that urged investors to sell the underlying stock. The bulletin board messages omitted material disclosure regarding his interest in the stock.

10 Merriam-Webster's Online Dictionary, definition of "blog," at *http://www.merriam-webster.com/dictionary/BLOG.*

11 The key to this distinction between whether a blog is considered an advertisement versus an interactive electronic forum is whether it is used to engage in real-time interactive communications with third parties. Thus, the mere updating of a non-interactive blog (or any other firm Web page) does not cause it to become an interactive electronic forum, even if the updating occurs frequently.

12 Currently, NASD Rule 2210(b) requires that a registered principal of a firm approve all advertisements and sales literature prior to use either electronically or in writing. FINRA has proposed amendments to this rule. These amendments would retain this prior to use principal approval requirement for "retail communications" as defined in the proposal. *See Regulatory Notice 09-55* (Sept. 2009).

Endnotes Continued

13 *See, e.g.*, March 1999 Ask the Analyst, *supra* note 3.

14 *See Commission Guidance on the Use of Company Web Sites*, SEC Rel. No. 34-58288 (Aug. 1, 2008), 73 Fed. Reg. 45862, 45870 (Aug. 7, 2008) ("2008 SEC Release"); *Use of Electronic Media*, SEC Rel. No. 33-7856 (April 28, 2000), 65 Fed. Reg. 25843, 25848-25849 (May 4, 2000).

15 *See* 2008 SEC Release, *supra* note 14, 65 Fed. Reg. 45870 n.78.

16 *See* 47 U.S.C. § 230(c).

Regulatory Notice 11-39

Social Media Websites and the Use of Personal Devices for Business Communications

Guidance on Social Networking Websites and Business Communications

Executive Summary

In January 2010, FINRA issued *Regulatory Notice 10-06*, providing guidance on the application of FINRA rules governing communications with the public to social media sites and reminding firms of the recordkeeping, suitability, supervision and content requirements for such communications. Since its publication, firms have raised additional questions regarding the application of the rules. This *Notice* responds to these questions by providing further clarification concerning application of the rules to new technologies. It is not intended to alter the principles or the guidance provided in *Regulatory Notice 10-06*.

Questions concerning this *Notice* may be directed to:

- Joseph E. Price, Senior Vice President, Advertising Regulation/Corporate Financing, at (240) 386-4623;
- Thomas A. Pappas, Vice President, Advertising Regulation, at (240) 386-4553; or
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- Recordkeeping
- Social Networking Websites
- Supervision

Referenced Rules & Notices
- NASD Rule 2210
- NASD Rule 2211
- NASD Rule 3010
- FINRA Rule 4511
- NTM 05-48
- Regulatory Notice 08-77
- Regulatory Notice 10-06
- Regulatory Notice 11-14
- SEA Rule 17a-3
- SEA Rule 17a-4

Financial Industry Regulatory Authority

Background

1. Recordkeeping

The obligations of a firm to keep records of communications made through social media depend on whether the content of the communication constitutes a business communication. Rule 17a-4(b) under the Securities Exchange Act of 1934 (SEA) requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place.[1] Among these records, pursuant to SEA Rule 17a-4(b)(4), are "[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public."[2] The SEC has stated that the content of an electronic communication determines whether it must be preserved.[3]

2. Supervision

NASD Rule 3010 requires each firm to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable federal securities laws and FINRA rules. As part of this responsibility, a registered principal must review prior to use any social media site that an associated person intends to employ for a business purpose. The registered principal may approve use of the site for a business purpose only if the registered principal has determined that the associated person can and will comply with all applicable FINRA rules, the federal securities laws, including recordkeeping requirements, and any additional requirements established by the firm.

The registered principal must review an associated person's proposed social media site in the form in which it will be "launched." Some firms require a registered principal to review the first posting by an associated person on an interactive forum within the site. This approach can help to ensure that the registered principal will be reviewing not only the initial communication, but the social media site itself in its completed design.

FINRA considers unscripted participation in an interactive electronic forum to come within the definition of "public appearance" under NASD Rule 2210. Public appearances do not require prior approval by a registered principal. Firms may adopt risk-based supervisory procedures utilizing post-use review, including sampling and lexicon-based search methodologies, of unscripted participation in an interactive electronic forum. The procedures a firm adopts must be reasonably designed to ensure that interactive electronic communications do not violate FINRA or SEC rules, including the content requirements of NASD Rule 2210, such as the prohibition on misleading statements or claims and the requirement that communications be fair and balanced. A static posting is deemed an "advertisement" under NASD Rule 2210 and therefore requires a registered principal to approve the posting prior to use.[4]

3. Links to Third-Party Sites

Firms may not establish a link to any third-party site that the firm knows or has reason to know contains false or misleading content. A firm should not include a link on its website if there are any red flags that indicate the linked site contains false or misleading content. Additionally, a firm is responsible under NASD Rule 2210 for content on a linked third-party site if the firm has adopted or has become entangled with its content. For example, a firm may be deemed to have "adopted" third-party content if it indicates on its site that it endorses the content on the third-party site. A firm could be deemed to have become "entangled" with a third-party site if, for example, it participates in the development of the content on the third-party site.

4. Data Feeds

Firms must adopt procedures to manage data feeds into their own websites. FINRA is aware of situations in which firms have received data feeds that were inaccurate. Firms must be familiar with the proficiency of the vendor of the data and its ability to provide data that is accurate as of the time it is presented on the firm's website. Firms also must understand the criteria followed by vendors in gathering or calculating the types of data that the firm intends to feed into its website, in order to determine whether the vendor is performing this function in a reasonable manner.[5] Firms also should regularly review aspects of these data feeds for any red flags that indicate that the data may not be accurate, and should promptly take necessary measures to correct any inaccurate data.

Questions & Answers

Recordkeeping

Q1: Does determining whether a communication is subject to the recordkeeping requirements of SEA Rule 17a-4(b)(4) depend on whether an associated person uses a personal device or technology to make the communication?

A1: SEA Rule 17a-4(b)(4) requires a firm to retain records of communications that relate to its "business as such." Whether a particular communication is related to the business of the firm depends upon the facts and circumstances. This analysis does not depend upon the type of device or technology used to transmit the communication, nor does it depend upon whether it is a firm-issued or personal device of the individual; rather, the content of the communication is determinative. For instance, the requirement would apply if the electronic communication was received or sent by an associated person through a third-party's platform or system. A firm's policies and procedures must include training and education of its associated persons regarding the differences between business and non-business communications and the measures required to ensure that any business communication made by associated persons is retained, retrievable and supervised.

Q2: **When an associated person posts autobiographical information, such as place of employment or job responsibilities, does this information constitute a business communication?**

A2: As discussed in question 1 above, firms must develop policies and procedures that include training regarding the difference between business and non-business communications to enable appropriate compliance. In certain contexts, such as sending a resume to a potential employer, the communication could be viewed as not relevant to the business of the firm. In other contexts, such as posting a list of products or services offered by the firm, the communication likely will be viewed as a business communication.

Q3: **May a firm or associated person sponsor a social media site or use a communication device that includes technology which automatically erases or deletes the content?**

A3: No. Technology that automatically erases or deletes the content of an electronic communication would preclude the ability of the firm to retain the communications in compliance with their obligations under SEA Rule 17a-4. Accordingly, firms and associated persons may not sponsor such sites or use such devices.

Q4: **Do the recordkeeping requirements apply to third-party posts to a firm or an associated person's social media sites if the firm or the individual has not adopted or become entangled with the post?**

A4: *Regulatory Notice 10-06* addresses the application of NASD Rule 2210 to third-party posts on a social media site established by a firm or its associated persons. Unless the firm or its associated persons have adopted or become entangled with the post, FINRA generally does not treat third-party posts as the firm's or its associated persons' communications under the rule. The recordkeeping requirements, however, require retention of the records of all communications received by a firm or its associated persons relating to its business as such.

Q5: **Do the recordkeeping requirements differ for static and interactive communications?**

A5: They do not—the recordkeeping requirements are governed by the content of the communication. As noted above, the FINRA *supervision* requirements differ for static and interactive communications.

Supervision

Q6: Can interactive content become static?

A6: Yes. For example, interactive content could be copied or forwarded and posted in a static forum, such as a blog or static area of a Web page, in a manner that renders it static content. It then would constitute an advertisment under NASD Rule 2210, requiring prior approval by a registered principal of the firm.

Q7: What measures should a firm adopt to monitor compliance with its social media policies?

A7: A firm must conduct appropriate training and education concerning its policies, including those relating to social media. Firms must follow up on "red flags" that may indicate that an associated person is not complying with firm policies. Some firms require each associated person to certify on an annual or more frequent basis that the associated person is acting in a manner consistent with such policies. When feasible, some firms also have chosen to randomly spot check websites to help them monitor compliance with firm policies.

Q8: Must material changes to static content posted by a firm or its associated persons on a social media site that contains business communications receive prior approval by a registered principal?

A8: NASD Rule 2210(1)(b) requires a registered principal to approve each advertisement and item of sales literature before the earlier of its use or filing with FINRA's Advertising Regulation Department. NASD Rule 2210(c)(8) excludes from the filing requirements any advertisement or sales literature that previously had been filed and that is to be used "without material change." Firms are expected to adopt procedures requiring prior registered principal approval of any advertisement or sales literature that has been materially changed, even if it had been previously approved in an earlier version. For example, changes in the description of the advantages of investing in the advertised product or of its risks would typically require registered principal prior approval. Since static content posted by a firm or its associated persons on a social media site that contains business communications is considered to be an advertisement, these procedures must apply to such static content.

Third-Party Posts, Third-Party Links and Websites

Q9: If a third party posts a business-related communication, such as a question about a security, on an associated person's personal social media site, may the associated person respond to the communication?

A9: Yes, provided that the response does not violate the firm's policies concerning participation on a personal social media site. If a firm has a policy that associated persons may not use a personal social media site for business purposes, then a substantive response by the associated person would violate this policy.[6] Some firms permit a non-substantive response, and pre-approve statements that their associated persons may make to respond to such posts and that direct the third party to other firm-approved communication media, such as the firm's email system.

Q10: To what extent is a firm responsible for any third-party website that the firm or its associated person "co-brands"?

A10: Under NASD Rule 2210, a firm that co-brands any part of a third-party site, such as by placing the firm's logo prominently on the site, is responsible for the content of the entire site. Under these circumstances, FINRA considers the firm to have adopted the content on that site. A firm is responsible under NASD Rule 2210 for content on a linked third-party site if the firm has adopted or become entangled with its content. *Regulatory Notice 10-06* describes the "adoption" and "entanglement" theories as they apply to third-party posts on a firm's social media sites. FINRA considers a firm to have adopted content in a third-party post if the firm or its personnel explicitly or implicitly endorse or approve the post.

Q11: When is a firm *not* responsible for the content on a third-party site to which it links?

A11: A firm may establish a link to the site of an independent third party without assuming responsibility for the content of that site under NASD Rule 2210 if:

- the firm does not "adopt" or become "entangled" with the content of the third-party site; and
- the firm does not know or have reason to know that the site contains false or misleading information.

Q12: If firm policy requires deletion of inappropriate third-party content, will the firm be considered to have adopted any third-party posts that are not deleted?

A12: No. The fact that the firm has a policy of routinely blocking or deleting certain types of content in order to ensure the content is appropriate would not mean that the firm had adopted the content of the posts left on the site. For example, most firms using social media sites block or screen offensive material. Such a policy would not indicate that the firm has adopted the remaining third-party content.

Q13: Does NASD Rule 2210 require firms to approve or maintain records of statistical information that the firm has regularly updated on its website?

A13: NASD Rule 2210(b)(1) requires that a registered principal approve each advertisement and item of sales literature prior to use or filing with FINRA's Advertising Regulation Department. NASD Rule 2210(b)(2) requires firms to maintain all advertisements and sales literature, including the names of the persons who prepared them or approved their use, for a period beginning on the date of first use and ending three years from the date of last use.

Statistical information that is posted on a firm's website would be considered an "advertisement" subject to the approval and recordkeeping requirements of NASD Rules 2210(b)(1) and (2). However, some firms establish templates for the presentation of this data, and subject these templates to those provisions. The data that is fed into the website in accordance with such a template would not be subject to the requirements of NASD Rules 2210(b)(1) and (2). The firm must have procedures reasonably designed to ensure that the data can be verified to ensure that it is timely and accurate, and that the firm can promptly correct data that is erroneous when posted or becomes inaccurate over time.

Accessing Social Media Sites From Personal Devices

Q14: May associated persons use personal communication devices and other equipment, such as a smart phone or tablet computer, to access firm business applications and perform business activity if the firm employs technology that enables the firm to keep records and supervise the activity?

A14: Yes. Firms may permit their associated persons to use any personal communication device, whether it is owned by the associated person or the firm, for business communications. FINRA recognizes that the development of new technologies can facilitate the ability of associated persons to perform their responsibilties and, in the case of registered representatives, to serve their clients. Of course, the firm must be able to retain, retrieve and supervise business communications regardless of whether they are conducted from a device owned by the firm or by the associated person.

In order to ensure that the business communications are readily retrievable without necessitating the capture of personal communications made on the same device, firms should have the ability to separate business and personal communications, such as by requiring that the associated persons use a separately identifiable application on the device for their business communications. If possible, this application should provide a secure portal into the firm's own communication system, particularly if confidential customer information may be shared. If the firm has the ability to separate business and personal communications, and has adequate electronic communications policies and procedures regarding usage, then the firm is not required to supervise the personal emails made on these devices. Of course, firms also are free to treat all communications made through the personal communication device as business communications.

Endnotes

1. SEA Rule 17a-4(f) permits broker-dealers to maintain and preserve these records on "micrographic media" or by means of "electronic storage media," as defined in the rule and subject to a number of conditions.

2. *See also* NASD Rule 2210(b)(2) (requiring the retention of all advertisements, sales literature and independently prepared reprints), NASD Rule 2211(b)(2) (requiring the retention of institutional sales material) and NASD Rule 3010(d)(3) (requiring the retention of correspondence of registered representatives).

3. *See* Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934, SEC Rel. No. 34-38245 (Feb. 5, 1997).

4. FINRA has filed with the SEC a proposed rule change that would replace most of the NASD and NYSE rules governing communications with the public with a series of new FINRA rules. *See* SR-FINRA-2011-035. Among other changes, the term "advertisement" would be subsumed within a new communication category, "retail communication."

5. *Cf., Regulatory Notice 08-77* (Dec. 2008) (Customer Account Statements) (discussion of "data vendors"). *See also Notice to Members (NTM) 05-48* (July 2005) (Members' Responsibilities When Outsourcing Activities to Third-Party Service Providers); *Regulatory Notice 11-14* (March 2011) (FINRA Requests Comment on Proposed New FINRA Rule 3190 to Clarify the Scope of a Firm's Obligations and Supervisory Responsibilities for Functions or Activities Outsourced to a Third-Party Service Provider).

6. Of course, if the firm permits business-related communications on a personal social media site, then the firm must supervise that site for compliance with applicable rules and the federal securities laws.

IM Guidance Update

March 2014 | No. 2014-4

GUIDANCE ON THE TESTIMONIAL RULE AND SOCIAL MEDIA

From time to time, we have been asked questions concerning the nature, scope and application of the rule that prohibits investment advisers from using testimonials in their advertisements. In addition, in the past several years, we have been asked a number of questions concerning investment advisers' use of social media. We are now providing this guidance concerning registered investment advisers' use of social media and their publication[1] of advertisements that feature public commentary about them that appears on independent, third-party social media sites.[2]

We understand that use of social media has increased the demand by consumers for independent, third-party commentary or review of any manner of service providers, including investment advisers. We recognize that social media has facilitated consumers' ability to research and conduct their own due diligence on current or prospective service providers. Through this guidance, we seek to clarify application of the testimonial rule as it relates to the dissemination of genuine third-party commentary that could be useful to consumers.

Specifically, we seek through this guidance to assist firms in applying section 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") and rule 206(4)-1(a)(1) thereunder ("testimonial rule") to their use of social media.[3] The guidance, in the form of questions and answers, also seeks to assist investment advisers in developing compliance policies and procedures reasonably designed to address participation in this evolving technology, specifically with respect to the publication of any public commentary that is a testimonial.

Consistent with previous staff guidance, we believe that in certain circumstances, as described below, an investment adviser's or investment advisory representative's ("IAR's") publication of all of the testimonials about the investment adviser or IAR from an independent social media site on the investment adviser's or IAR's own social media site or website would not implicate the concern underlying the testimonial rule.[4]

US Securities and Exchange Commission
Division of Investment Management

BACKGROUND

Section 206(4) generally prohibits any investment adviser from engaging in any act, practice or course of business that the Commission, by rule, defines as fraudulent, deceptive or manipulative. In particular, rule 206(4)-1(a)(1) states that:

> *[i]t shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business . . . for any investment adviser registered or required to be registered under [the Advisers Act], directly or indirectly, to publish, circulate, or distribute any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser.*

Rule 206(4)-1(a)(1) was designed to address the nature of testimonials when used in investment advisory advertisements. When it adopted the rule, the Commission stated that, in the context of investment advisers, it found ". . . such advertisements are misleading; by their very nature they emphasize the comments and activities favorable to the investment adviser and ignore those which are unfavorable."[5] The staff has stated that the rule forbids the use of a testimonial by an investment adviser in advertisements "because the testimonial may give rise to a fraudulent or deceptive implication, or mistaken inference, that the experience of the person giving the testimonial is typical of the experience of the adviser's clients."[6]

Whether public commentary on a social media site is a testimonial depends upon all of the facts and circumstances relating to the statement. The term "testimonial" is not defined in the rule, but the staff has consistently interpreted that term to include a "statement of a client's experience with, or endorsement of, an investment adviser."[7] Depending on the facts and circumstances, public commentary made directly by a client about his or her own experience with, or endorsement of, an investment adviser or a statement made by a third party about a client's experience with, or endorsement of, an investment adviser may be a testimonial.[8]

The staff also has stated that an investment adviser's publication of an article by an unbiased third party regarding the adviser's investment performance is not a testimonial, unless it includes a statement of a client's experience with or endorsement of the adviser.[9] The staff also has stated that an adviser's advertisement that includes a partial client list that does no more than identify certain clients of the adviser cannot be viewed either as a statement of a client's experience with, or endorsement of, the adviser and therefore is not a testimonial.[10] Such an advertisement could nonetheless violate section 206(4) and rule 206(4)-1(a)(5) if the advertisement is false or misleading.[11]

The staff no longer takes the position, as it did a number of years ago, that an advertisement that contains non-investment related commentary regarding an IAR, such as regarding an IAR's religious affiliation or community service, may be deemed a testimonial violative of rule 206(4)-1(a)(1).[12]

The following questions and answers are intended to provide more guidance.

Third-party commentary

Q1. *May an investment adviser or IAR publish public commentary that is an explicit or implicit statement of a client's experience with or endorsement of the investment adviser or IAR on the investment adviser's or IAR's social media site?*

A1. Generally, staff believes that such public commentary would be a testimonial within the meaning of rule 206(4)-1(a)(1) and its use in an advertisement by an investment adviser or IAR would therefore be prohibited.

- For example, if an investment adviser or IAR invited clients to post such public commentary directly on the investment adviser's own internet site, blog or social media site that served as an advertisement for the investment adviser or IAR's advisory services, such testimonials would not be permissible.

Q2. *May an investment adviser or IAR publish the same public commentary on its own internet or social media site if it comes from an independent social media site?*

A2. When an investment adviser or IAR has no ability to affect which public commentary is included or how the public commentary is presented on an independent social media site; where the commentators' ability to include the public commentary is not restricted;[13] and where the independent social media site allows for the viewing of <u>all</u> public commentary and updating of new commentary on a real-time basis, the concerns underlying the testimonial prohibition may not be implicated.

As described in more depth below, publication of public commentary from an independent social media site would not raise any of the dangers that rule 206(4)-1(a)(1) was designed to prevent if:

- the independent social media site provides content that is independent of the investment adviser or IAR;

- there is no material connection between the independent social media site and the investment adviser or IAR that would call into question the independence of the independent social media site or commentary; and

- the investment adviser or IAR publishes all of the unedited comments appearing on the independent social media site regarding the investment adviser or IAR.[14]

Under these circumstances, an investment adviser or IAR may include such public commentary in an advertisement without implicating the concerns underlying the testimonial rule.

If, however, the investment adviser or IAR drafts or submits commentary that is included on the independent social media site, the testimonial rule generally would be implicated. Also, if the investment adviser or IAR is allowed to suppress the publication of all or a portion of the commentary, edit the commentary or is able to organize or prioritize the order in which the commentary is presented, the testimonial rule generally would be implicated.

Q3. *What content is not independent of an investment adviser or IAR and what is a material connection that would call into question the independence of a site or commentary?*

A3. Commentary would not be independent of an investment adviser or IAR if the investment adviser or IAR directly or indirectly authored the commentary on the independent social media site, whether in their own name, a third party's name, or an alias, assumed or screen name.

An investment adviser or IAR would have a material connection with a site or commentary that would call into question the independence of the site or commentary if, for example, the investment adviser or IAR: (1) compensated a social media user for authoring the commentary, including with any product or service of value; or (2) prioritized, removed or edited the commentary.[15]

- For example, an investment adviser could not have a supervised person submit testimonials about the investment adviser on an independent social media site and use such testimonials in advertisements without implicating the testimonial rule.

- An investment adviser or IAR could not compensate a client or prospective client (including with discounts or offers of free services) to post commentary on an independent social media site and use such testimonials in advertisements without implicating the testimonial rule.

Q4. *May an investment adviser or IAR publish testimonials from an independent social media site in a way that allows social media users to sort the criteria?*

A4. An investment adviser or IAR's publication of testimonials from an independent social media site that directly or indirectly emphasizes commentary favorable to the investment adviser or IAR or de-emphasizes commentary unfavorable to the investment adviser or IAR would implicate the prohibition on testimonials. The investment adviser may publish only the totality of the testimonials from an independent social media site and may not highlight or give prominence to a subset of the testimonials.

- Investment adviser or IAR sites may publish the testimonials from an independent social media site in a content-neutral manner, such as by chronological or alphabetical order, which presents positive and negative commentary with equal prominence.

- Social media users, however, are free to personally display the commentary and sort by any criteria, including by the lowest or highest rating. Investment adviser and IAR sites may facilitate a user's viewing of the commentary by providing a sorting mechanism as long as the investment adviser or IAR site does not itself sort the commentary.

Q5. *May an investment adviser or IAR publish testimonials from an independent social media site that includes a mathematical average of the public commentary?*

A5. Publication by an investment adviser or IAR of such testimonials from an independent social media site would not raise any of the dangers that rule 206(4)-1(a)(1) was designed to prevent if the independent social media site were designed to make it equally easy for the public to provide negative or positive commentary about an investment adviser or IAR.

- Investment advisers or IARs could publish testimonials from an independent social media site that include a mathematical average of the commentary provided that commenters themselves rate the investment advisers or IARs based on a ratings system that is not designed to elicit any pre-determined results that could benefit any investment adviser or IAR.

- The independent social media site, the investment adviser and the IAR may not provide a subjective analysis of the commentary.[16]

Inclusion of on Investment Adviser Advertisements on Independent Social Media Site

Q6. *May an investment adviser or IAR publish public commentary from an independent site if that site also features the investment adviser or IAR's advertising?*

A6. The existence of an investment adviser or IAR's advertisement within the architecture of an independent site that also contains independent public commentary does not, in combination, create a prohibited testimonial or otherwise make the advertisement false or misleading, provided that the investment adviser complies with the material connection and independence factors described above and provided that the advertisement is easily recognizable to the public as a sponsored statement.

- In other words, an advertisement would not cause the investment adviser or IAR's publication of the independent social media site's commentary to violate rule 206(4)-1 where (1) it would be readily apparent to a reader that the investment adviser or IAR's advertisement is separate from the public commentary featured on the independent social media site and (2) the receipt or non-receipt of advertising revenue did not in any way influence which public commentary is included or excluded from the independent social media site.

Reference to Independent Social Media Site Commentary Investment Adviser Non-Social Media Advertisements

Q7. *May an investment adviser or IAR refer to public commentary from an independent social media site on non-social media advertisements* (*e.g.*, newspaper, radio, television)*?*

A7. An investment adviser or IAR could reference the fact that public commentary regarding the investment adviser or IAR may be found on an independent social media site, and may include the logo of the independent social media site on its non-social media advertisements, without implicating the testimonial rule.

- For example, an IAR could state in its newspaper ad "see us on [independent social media site]," to signal to clients and prospective clients that they can research public commentary about the investment adviser or IAR on an independent social media site.

- In contrast, an investment adviser or IAR may not publish any testimonials from the independent social media site on the newspaper ad without implicating the testimonial rule.[17]

Client lists

Q8. Would a list or photographs of "friends" "or "contacts" on an investment adviser or IAR's social media site that is viewable by the general public be considered a testimonial or otherwise violate section 206(4) or rule 206(4)-1?

A8. It is common on social media sites to include a communal listing of contacts or friends. The staff has stated that an advertisement that contains a partial client list that does no more than identify certain clients of the adviser cannot be viewed either as a statement of a client's experience with, or endorsement of, the investment adviser, and therefore is not a testimonial.[18] Such an advertisement, however, could be false or misleading under rule 206(4)-1(a)(5) depending on the facts and circumstances.

- If the contacts or friends are not grouped or listed so as to be identified as current or past clients of an IAR, but are simply listed by the social media site as accepted contacts or friends of the IAR in the ordinary course, such a listing of contacts or friends generally would not be considered to be in violation of rule 206(4)-1(a)(1).

- However, if an IAR attempts to create the inference that the contacts or friends have experienced favorable results from the IAR's investment advisory services, the advertisement could be considered to be in violation of section 206(4) and rule 206(4)-1.

Fan/Community Pages

Q9. Individuals unconnected with a particular investment adviser or IAR may establish "community" or "fan" or other third-party sites where the public may comment on a myriad of investment topics, along with commentary regarding an investment adviser firm or individual IARs. Do such sites raise concerns under rule 206(4)-1?

A9. In the ordinary course, a third party's creation and operation of unconnected community or fan pages generally would not implicate rule 206(4)-1. We strongly caution investment advisers and supervised persons when publishing content from or driving user traffic to such sites (including through hyperlinks to such sites), particularly if the site does not meet the material connection and independence conditions described above. The Commission has stated that:

> *any SEC-registered investment adviser (or investment adviser that is required to be SEC registered) that includes, in its web site or in other electronic communications, a hyperlink to postings on third-party web sites, should carefully consider the applicability of the advertising provisions of the [Advisers Act]. Under the Advisers Act, it is a fraudulent act for an investment adviser to, among other things, refer to testimonials in its advertisements.*[19]

Endnotes

1 For purposes of this guidance, "publication" refers to any form of real-time broadcast through social media or the Internet whether by hyperlinking, posting, live-streaming, tweeting, or forwarding or any similar public dissemination and, does not relate to advertisements on non-Internet or non-social media sites, such as paper, television or radio. Social media allows for instantaneous updating of posted commentary and concurrent viewing of *all of* the comment history; in contrast, paper, television and radio are static media that reflect public commentary at a particular point in time and are limited media that would typically not reproduce all of the available public commentary simultaneously (often due to cost, space and other considerations).

2 As used herein, "independent social media sites" refers specifically to third-party social media sites that predominantly host user opinions, beliefs, findings or experiences about service providers, including investment advisory representatives or investment advisers (*e.g.*, Angie's List). An investment adviser's or IAR's own social media profile or account that is used for business purposes is not an "independent social media site."

3 This *IM Guidance Update* only addresses the use by a firm or IARs of social media sites for business purposes. This Update does not address the use by individuals of social media sites for purely personal reasons. This Update does not seek to address any obligations under state law of social media for business use. In addition, this guidance does not seek to address the use of social media sites by broker-dealers.

4 Any such advertisements also must comply with rule 206(4)-1(a)(5).

5 Investment Advisers Act Rel. No. 121 (Nov. 2, 1961) (adopting rule 206(4)-1).

6 *See* Richard Silverman, Staff No-Action Letter (pub. avail. March 27, 1985).

7 *See* Cambiar Investors, Inc., Staff No-Action Letter (pub. avail. Aug. 28, 1997) ("Cambiar").

8 *See* DALBAR, Inc., Staff No-Action letter (pub. avail. March 24, 1998) ("DALBAR").

9 *See* New York Investors Group, Inc., Staff No-Action Letter (pub. avail. Sept. 7, 1982); Stalker Advisory Services, Staff No-Action Letter (pub. avail. Feb. 14, 1994). *See also* Kurtz Capital Management, Staff No-Action Letter (pub. avail. Jan. 22, 1988).

10 *See* Cambiar, supra note 7.

11 *Id.* ("For example, the inclusion of a partial client list in an adviser's advertisement has the potential to mislead investors if the clients on the list are selected on the basis of performance and this selection bias is not adequately disclosed. A list that includes only advisory clients who have experienced above-average performance could lead an investor who contacts the clients for references to infer something about the adviser's competence or about the possibility of enjoying a similar investment experience that the investor might not have inferred if criteria unrelated to the client's performance had been used to select the clients on the list or if the selection bias was fully and fairly disclosed.").

12 *See* Dan Gallagher, Staff No-Action Letter (pub. avail. July 10, 1995). Advisers that publish advertisements regarding non-investment related commentary remain subject to the fiduciary responsibilities imposed by section 206(1) and (2) of the Advisers Act. Thus an adviser cannot use social media to perpetrate affinity frauds, which are investment scams that prey upon members of identifiable groups, such as religious or ethnic communities, the elderly, or professional groups. Affinity frauds can target any group of people who take pride in their shared characteristics, whether they are religious, ethnic, or professional. *See* http://www.sec.gov/investor/pubs/affinity.htm.

13 Some independent social media sites may have member fees or subscriptions payable by users. An investment adviser or IAR's publication of public commentary from a site that charges member or subscription fees to public users would not call into question the independence of the independent social media site for purposes of our views herein.

14 Independent social media sites may have editorial policies that edit or remove public commentary violative of the site's own published content guidelines (*e.g.*, prohibiting defamatory statements; threatening language; materials that infringe on intellectual property rights; materials that contain viruses, spam or other harmful components; racially offensive statements or profanity). An investment adviser or IAR's publication of public commentary that has been edited according to such an editorial policy would not call into question the independence of the independent social media site for purposes of the staff's views herein.

15 As explained in Q6 below, any arrangement whereby the investment adviser or IAR compensated the independent social media site, including with advertising or other revenue, in order to publish or suppress the publication of anything less than the totality of the public commentary submitted could render any use by the IAR or investment adviser on its social media site violative of the prohibition on testimonials.

16 *See* DALBAR, supra note 8.

17 *See* supra note 1.

18 *See Cambiar, supra* note *7*.

19 *See* Commission Guidance on the Use of Company Websites at note 83, Investment Company Act Rel. No. 28351 (Aug. 1, 2008). *See also SEC Interpretation: Use of Electronic Media*, Investment Company Act Rel. No. 24426 (May 4, 2000).

This *IM Guidance Update* summarizes the views of the Division of Investment Management regarding various requirements of the federal securities laws. Future changes in laws or regulations may supersede some of the discussion or issues raised herein. This *IM Guidance Update* is not a rule, regulation or statement of the Commission, and the Commission has neither approved nor disapproved of this *IM Guidance Update*.

The Investment Management Division works to:

- protect investors
- promote informed investment decisions and
- facilitate appropriate innovation in investment products and services

through regulating the asset management industry.

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How to use the cloud securely (because it's not going away)

Like anything you do for your business, don't do it just to keep pace. Make it a determined decision that will either save you time, money or both.

By Blane Warrene | *August 18, 2014 - 1:42 pm EST*

You can't have a business conversation or attend an industry conference without hearing someone ask "are you in the cloud?" Indeed, servers and disk storage have been evolving frighteningly quickly over the past five years.

However, like anything you do for your business, don't do it just to keep pace. Make it a determined decision that means you will either save time, money or both. And if you can add in offering new capabilities for your clients, all the better.

You can embrace the cloud in a meaningful way.

Chances are most of you have already, most likely in the form of an app powering your business operations such as customer relationship management, financial planning or portfolio re-balancing. What has tripped up most firms is the most commoditized part of the cloud: Files and folders.

Cloud storage (replacing our internal servers) comes in three basic varieties.

• Basic, no-frills storage that simply mimics your offline server's file and folder structure. At a minimum, it should allow basic search, upload and download and possibly some level of access control

• The second type — secure file sharing — offers a secure method for distribution of files (even those that are mega-sized) but does not provide the general storage and organizational facility of an offline server. This will include encryption, expiring sharing of files and support for tracking of when those files were received.

• Finally, there is the server in the cloud model, offering fully featured cloud server storage, with everything you have in an offline server, as well as the secure distribution of files and folders, tagging and search, collaboration features and perhaps even disaster recovery services.

A KEY TERM TO REMEMBER

Encryption at rest. Encryption is the method through which a file is secured and only visible to someone with the proper key to unlock it. Encryption at rest is a more recent technique of insuring that all data stored in a cloud destination is encrypted at all times, thus reducing the possibility that someone unauthorized could be exposed to your data, even if unintentional (such as customer service personnel or engineers).

Before focusing on the vendor, let's cover the basics for stepping up security for yourself as a precursor to using the cloud.

1. Ensure your laptops and desktops are hard-disk encrypted so that data is secured at rest on your computers even when offline. Thus, if someone steals your physical computers, they have gotten their hands on a fantastic paperweight and not the confidential data you seek to protect. There is a subplot here. It is assumed you will then have a backup service for that secured data in the event you do lose that computer and need to restore it to a new machine.

2. Your portable devices must be secured by at minimum a pin or password to unlock and use. Optimally you'll also have a security app (now available from Lookout, Trend Micro and Symantec). These apps scan for malware, offer varying levels of data backup and offer location services in the event a device is lost. Also ensure you are securing your use of public WiFi connections using a service like VPN1Click or Cloak.

3. All of your online accounts that support it should have two-factor authentication enabled. This is no longer a decision to make. Regardless of inconvenience, the password security model is broken and we are responsible for data that is far too precious to put at risk.

4. Your cloud storage provider should be able to substantiate that it stores your data encrypted at rest, on its platform. The provider also should vouch for backup or

redundancy.

What are some standards to use to evaluate? Certainly requirements will have some unique twists based on your business and its service model, but there are some constants.

Here are some key questions to consider when evaluating cloud storage:

• How does the provider support Finra and/or SEC regulations governing your storage and use of business data?

• Does the cloud provider have a key to decipher the encryption provided to you for security of your data?

• What level of SSL encryption is used for the web browser connectivity, where file transfer also occurs? This is technical but important to understand.

• Can you ship an encrypted drive to transfer large amount of data? This allows you to implement a new solution and securely shift gigabytes or even terabytes of data onto your new cloud storage without risking the underlying information.

• How can you manage users, adding and removing them to protect data as changes occur in your business? Can you enforce two-factor authentication and other business rules on remote employees? Can you control how files and folders can be shared?

• What devices can you use with the service and does security extend to those apps and devices, including for syncing data?

• What integrations are available, such as connectivity to CRM, proposal or project management tools and other systems used in your business? How is your data secured when in transit with those integrations?

It's important to take seriously the evaluation of any solution, not just the cloud. Don't assume anything and ask for confirmation of your questions on backup, security and redundancy. Moreover, it is key to remember that nothing is (nor has ever been) bulletproof from bad actors who seek to compromise systems.

While the cloud is a convenient scapegoat as security risk, there is no alternative and there won't be one as our systems continue to interconnect and become web-distributed. By taking the steps to shore up your own security habits and carefully selecting your cloud providers, you can greatly minimize the risk of being a victim.

Blane Warrene speaks and writes frequently on technology and the intersection of

marketing and compliance in financial services. He co-founded Arkovi and QuonWarrene, the former acquired by RegEd in 2012. He produces the Digital Well podcast.